No. 83-0317

IN THE

Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK, *et al.*,

Petitioners,

vs.

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' OPENING BRIEF.

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Petition for Certiorari filed August 23, 1983.
Certiorari granted November 7, 1983.

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Questions Presented.

1. Whether jail inmates have a constitutional right to contact visitation?

2. Whether jail inmates have a constitutional right to be present to observe and make inquiries during general searches of their cells?

Parties.

Petitioners herein are:

SHERMAN BLOCK, Sheriff of the County of Los Angeles, successor in office to Peter J. Pitchess, Appellant below; FRED E. STEMRICK, Assistant Sheriff, successor in office to William Anthony, Appellant below; JAMES W. PAINTER, Chief of the Los Angeles County Sheriff's Department Custody Division, successor in office to John Knox, Appellant below; RON BLACK, Captain Central Jail, successor in office to James White, Appellant below; EDWARD EDELMAN, KENNETH HAHN, and PETER SCHABARUM, Supervisors of the County of Los Angeles and Appellants below; DEANE DANA and MICHAEL D. ANTONOVICH, Supervisors of the County of Los Angeles, as successors in office to James Hayes and Baxter Ward, Appellants below.

Respondents herein are:

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR.

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OPINIONS BELOW.

The following Opinions, decisions, and judgments of the District Court and the Court of Appeals appear in the Appendix to the Petition for Certiorari ("PA") and the Joint Appendix ("JA"), as referenced.

Filed		*Location*
7/25/78	Reported Memorandum Decision of the District Court, *Rutherford v. Pitchess*, 457 F.Supp. 104 (C.D. Cal. 1978)	PA 41
2/15/79	Unreported Supplemental Memorandum Decision of the District Court	PA 29
2/15/79	Unreported Judgment of the District Court	PA 37
8/8/80	Unreported Memorandum Opinion of the Court of Appeals	PA 17
5/18/81	Unreported Memorandum Decision of the District Court	PA 23
5/18/81	Unreported Judgment of the District Court	JA 93
7/14/83	As yet unreported Opinion of the Court of Appeals	PA 1

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 14, 1983, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The following constitutional and statutory provisions appear in the appendix hereto:

United States Constitution, Amendment 14, Section 1.

United States Code, Title 28, Sections 1343, 2201, 2202.

United States Code, Title 42, Section 1983.

STATEMENT OF THE CASE.

1. Procedural History.

The present action was filed in 1975 alleging jurisdiction under 28 U.S.C. § 1343 for a claim under 42 U.S.C. § 1983 for injunctive and declaratory relief pursuant to 28 U.S.C. §§ 2201, 2202, as a class action challenging a wide range of conditions of confinement at the Los Angeles County Men's Central Jail.

After a trial, the District Court issued its Memorandum Decision ("Mem. Dec. 1," 2/15/79, PA 41) granting a wide range of injunctive relief. The Sheriff was granted a rehearing concerning several issues, including the Court's orders requiring contact visits[1] for certain inmates, and certain procedures for searches of inmate housing areas. As a result of the rehearing, the District Court issued a Supplemental Memorandum Decision ("Supp. Mem. Dec.," 2/15/79, PA 29), *inter alia*, (1) requiring pretrial inmates[2] confined longer than 30 days and concerning whom there is no indication of drug or escape propensities, to be permitted one contact visit a week, up to a maximum of 1,500 such visits a week for all such inmates; and (2) requiring that available inmates be permitted to observe and make

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[1]The term "contact visits" is an imprecise term, rarely defined by the courts, and is commonly used to describe a wide range of visitation practices from arrangements permitting unrestricted physical contact, kissing and embracing in an outdoor setting to arrangements where inmates and visitors are separated by five foot partitions which preclude any significant tactile contact (Lonergan, RT (11/9/78) 4435-38). While the order involved in this case is not specific (See Judgment, JA 93), the Court clearly contemplated an arrangement whereby an inmate would have the opportunity to "embrace his wife or hug his children" (Mem. Dec. 2, 5/18/81, PA 25).

[2]"Pretrial inmates" is used generally to describe inmates held in jail while awaiting or engaged in a pending criminal trial. As used by the Court it includes inmates convicted of one or more charges and engaged in a trial on other charges (JA 59, para. IV. A.2).

inquiries during general searches of their own cell areas. (*Id.*)

The Sheriff appealed three of the District Court's orders, including the orders concerning contact visits and cell searches.[3] The other orders were not appealed.

In an unpublished Memorandum Opinion filed August 8, 1980 (PA 17), the Court of Appeals remanded the appealed orders to the District Court for reconsideration in light of the intervening decision in *Bell v. Wolfish* (1979) 441 U.S. 520 ("*Wolfish*"), finding that while the judicial standard of review of conditions of pretrial detention applied by the District Court tracked closely the standard promulgated by the Supreme Court, the District Court observed that proof of the availability of less restrictive means of accomplishing security objectives demonstrated that jail officials had exaggerated their response to security concerns, a mode of analysis rejected in *Wolfish* (PA 20). In remanding the matter the Court of Appeals indicated that the District Court could apply the *Wolfish* standards without further trial on the facts (*id.*).

On remand, and without further evidentiary hearing, the District Court, in an unreported Memorandum Decision filed May 18, 1981 ("Mem. Dec. 2," PA 23), acknowledged that *Wolfish* required some differences in analysis, but concluded it required no difference in result, and reaffirmed its previous orders, finding the categorical rejection of contact visitation exceeded the reasonable requirements of security, and that the ordered search procedures were a necessary prophylactic against improper seizure of inmates' property. (*Id.*)

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[3]The third appealed order required reinstallation of former windows at the jail. That order was ultimately reversed by the Court of Appeals (Op., PA 1, 12-14), and is not involved in the present proceedings.

The Sheriff again appealed, and the Court of Appeals affirmed the orders with regard to contact visits and cell searches (PA 1). These orders have been stayed during appeal.

2. Factual Background.

Central Jail is one of seven jail facilities and numerous minor facilities operated by the Sheriff of Los Angeles County (JA 55, para. V. A.1) who is charged with the duty of housing, *inter alia*,[4] all persons in the County charged with crime and committed for trial or sentenced to imprisonment in the county jail (*cf.* California Penal Code § 4000). He serves a county with a population in excess of 7,000,000 people living in an area of over 4,000 square miles (JA 55, para. V. A.1). The entire jail system receives more than 200,000 prisoners a year, most of whom are in the Sheriff's custody less than 10 days, and has an average daily population of over 9,000 inmates, male and female. (*Id.*)

Central Jail, a large, air conditioned three story building built in 1963, and the new addition thereto which became operational shortly before trial, is located in downtown Los Angeles, a few miles from the Civic Center Courts (Anthony Affidavit, CT 216, (Dk. 3061),[5] admitted in evidence by stipulation, JA 91). It is a major facility, with a rated capacity in excess of 5,000 inmates, and is the primary County facility for housing male pretrial detainees, most of whom

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[4]Pursuant to state law, persons detained as witnesses or held under civil process, or committed for contempt are also housed at county jails. California Penal Code § 4000.

[5]By order filed 8/21/81 the Court of Appeals in the present appeal (Dk. No. 81-5461) permitted the records from the prior appeals (Dk. No.'s 79-3061 and 79-3367) to be used. The clerk's record will be referenced to the appropriate appeal by docket number.

"remain at the jail only for a few days or weeks"[6] (Supp. Mem. Dec., PA 32). Central Jail is the entry and exit point for all male prisoners in the jail system and serves as the central staging area for all inmates, male and female, who are transported to court daily (Mem. Dec. 1, PA 55-60). Each weekday the Sheriff transports between 700 and 1,000 inmates to 26 separate jurisdictional courts located over the wide expanse of the County, and back to the Jail after court (JA 73, para. XV. A.1).

Inmates are housed in cell blocks and dormitories pursuant to a classification system, and travel to centralized meals, medical services, visiting, attorney visits, recreation, school, church services, and other activities either unescorted or in groups monitored by one or a few deputies (JA 68, para. V. A.1; Lonergan, RT (11/9/78) 4447:7-12).

The visitation procedures found constitutionally inadequate permit daily, unmonitored visits with adults and chil-

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[6]Neither the District Court nor the Court of Appeals made more specific findings on the average length of confinement or on the range of the length of confinement. The Court of Appeals mentioned "prolonged" confinement (Op., PA 5-6). The District Court order regarding contact visits implies at least 1,500 inmates in custody over 30 days. Due to idiosyncrasies in the Jail's computer system, the fact that during their incarceration inmates may be transferred to other jail facilities in the County jail system for part or most of their confinement, or may be released on bail and return to custody upon revocation of bail, or rearrest on other charges, or that inmates may be awaiting trial on one charge while serving sentences on other charges, makes exact statistics infeasible (RT 11/9/78, 4454-67). The plaintiffs contend that a sizable number of inmates remain in custody between 60 and 180 days or more (Appellees' Brief, docket No. 81-5461, pp. 6-7), and that 3 to 4 months or more may be required to process charges against some inmates charged with serious felonies (*id.*). Consistent with the Court's finding that most inmates remain at the jail only for a few days or weeks (Supp. Mem. Dec. 2, PA 32), it is reasonably clear that Central Jail is a relatively short-term facility, particularly when compared to state prisons where the stay for all inmates is one year or more. Cf. *Bell v. Wolfish, supra*, n.3 at 441 U.S. 524, where 27% of the MCC inmates remain in custody for some unspecified period in excess of 60 days.

dren 12 hours a day between the hours of 8:30 a.m. and 8:30 p.m.; the number of such visits average over 2,000 a day, over 63,000 a month (JA 61-62, para. VII. A.2). To accommodate such visits, there is a large, air conditioned visiting area designed to accommodate 228 visitors at one time, that is generally in constant use throughout the day (Lonergan Affidavit, CT 268:5-8 (Dk. No. 79-3061), admitted by stipulation, JA 91). The visiting area is arranged in corridors designed to minimize noise between rows, and privacy partitions are located between each visiting location to likewise reduce noise, and provide some element of privacy (*id.*, CT 268:8-11). Visitors and inmates are separated by 22" x 32" clear glass panels and speak over telephones (*id.*, CT 268:11-14). An area to sit and a shelf is provided on both the inmate and visitor sides for convenience and comfort (*id.*, CT 268:14-16).

No direct supervision of each visitor or inmate is done or required (*id.*, CT 268:17-19). Since visitors never enter the jail or come in contact with the inmates, the large number of visits can be accomplished with no prior appointments, screening, or approved visitor lists, and uninhibited by intrusive security measures (*id.*). Mail may be sent to and received from any person (JA 59, para. V. A.1). By virtue of another of the District Court's orders, each inmate has regular opportunities to make unmonitored telephone calls to whomever he wishes (Mem. Dec. 1, PA 60).

Under the search procedures found constitutionally inadequate by the Court, cell areas were searched while all inmates were out of the cell areas for other activities such as meals, exercise or the like. Under the ordered procedures, all inmates are to be removed to a separate dayroom area, and the available occupants of particular cells brought back to observe and make inquiries during the search of their particular cell (JA 94).

3. Reasoning of Courts Below.

Although the District Court recognized that "*any* program of contact visits does increase the importation of narcotics into the jail despite *all* safeguards and precautions" (Supp. Mem. Dec., PA 31; emphasis added) and the Sheriff's concerns about the possibility of the introduction of weapons, escape attempts, and hostages (*id.*, PA 32), the Court was equally impressed with the importance of physical contact with family members for prisoners detained for prolonged periods (*id.*, PA 31). Finding the Sheriff's categorical rejection of contact visits for all inmates at Central Jail to be an unreasonable, exaggerated response to the security concerns, the Court concluded that "[m]odest alteration within the jail *presumably* could provide appropriate space (for contact visits)", and that by limiting the number of such visits to no more than 1,500 a week for prisoners not determined to be drug or escape risks "the scope, burden, and dangers of the program would be substantially reduced" (Supp. Mem. Op., PA 33; emphasis added).

Although it was admitted that regular cell searches are necessary (JA 72, para. XII. A.2), the prisoners contended they were conducted in a manner which results in leaving the cells in disarray and improper confiscation of their property (JA 72, paras. XII. B.1-2). Although not specifically resolving the conflicting evidence as to the prisoners' contentions (Mem. Dec. 1, PA 60-61), the District Court concluded that allowing inmates to observe the searches " 'would go far to eliminate these grounds of complaint' ", would motivate the officers to " 'fulfill the stated duty to put things back as they were' ", and a claim of " 'stolen property is far less likely to be made, the grounds for suspicion, or ostensible suspicion, being largely eliminated' " (Mem. Dec. 1, PA 61).

In affirming with regard to contact visits and searches, the Court of Appeals, acknowledging the principles promulgated in *Wolfish*, viewed a court's proper role in evaluating jail restrictions as finding the mutual accommodation between the institution's needs and the interests of detainees, who have not yet been convicted of any crime, in exercising their retained constitutional rights.

With regard to contact visits, the Court of Appeals concluded that while contact visitation is not constitutionally mandated for all detainees in all facilities, the District Court properly accommodated the jail's security interests with the adverse psychological effects caused by the lack of physical contact with family members over prolonged periods of time in concluding that a blanket restriction on contact visits for all detainees at Central Jail was an unreasonable, exaggerated response to security concerns at that facility.

With regard to the search procedures, the Court of Appeals, with one dissent, found that the District Court's conclusion that the ordered search procedures did not permit inmates to frustrate the search, and the District Court's reliance on due process rights of the inmates, distinguished the holding of this Court in *Wolfish* reversing the similar search procedures ordered by the District Court in that case.

SUMMARY OF ARGUMENT.

1. Standard of Review.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court promulgated a test of the constitutional validity of jail conditions affecting pretrial detainees. Where a condition implicates the 14th Amendment's protection against deprivation of liberty without due process, the proper inquiry is whether the condition amounts to punishment. A condition is punitive if there is a showing of an express intent to punish. Otherwise, if a particular condition is reasonably related to

a legitimate non-punitive objective, it does not, without more, amount to punishment. Legitimate objectives include maintaining security, order, discipline, and facilitating the effective management of the facility. Where a condition implicates another constitutional right, as well, a court must assess whether the condition impermissibly infringes that right. In making that assessment the court must recognize that the essential goals of maintaining security and preserving internal order may require limitation on the constitutional rights of detainees, and must grant wide-ranging deference to prison administrators in the adoption of policies to serve these goals.

The courts below did not find an express intent to punish as to either of the challenged orders, and did not find that the restrictions on contact visits or cell searches implicated constitutional rights other than the due process clause. Rather, as to both restrictions, the lower courts found that the Sheriff's response to admitted security concerns were exaggerated, and inferred an intent to punish.

In doing so, the lower courts misapplied the principles of *Wolfish*, merely disagreeing with the Sheriff about the extent of the security concerns and the means required to deal with them.

2. Contact Visits.

Given the unique and clear opportunity contact visitation presents for the introduction of drugs and weapons, for escape, hostages, and injury despite all safeguards, the denial of such visits should not be considered such an exaggerated response to permit the inference of punitive intent.

Moreover, the record does not support the Court's conclusion that the denial of contact visits is such an exaggerated response to security concerns that punitive intent may be inferred.

Although recognizing the risks in any program of contact visitation, the court felt that modest alteration of the jail or busing the inmates to another facility, and limiting the number of such visits to 1,500 a week for low risk classified inmates would substantially reduce the scope, burden, and dangers.

The Court was unable to articulate exactly what alterations could be made to the Jail to feasibly permit contact visits. The alternative of busing the inmates to another facility is impractical in light of the fact that the Sheriff is already required to transport one fifth of the Jail's population daily to 26 separate jurisdictional courts located over the wide expanse of the county, a process necessarily fraught with considerable security problems, and one which the Court found involves such a strain on inmates and staff that it alone rose to constitutional proportions.

Any classification system will miss serious risks. In addition, the design of the Jail, where inmates have considerable freedom of movement to varied centralized activities, and the daily need to commingle about one fifth of the Jail's population by court destination, precludes adequate separation of inmates to prevent those denied contact visits from using threats and violence to coerce those permitted contact visits to do their deeds for them.

The fact that other facilities permit contact visitation is not controlling, as there may be factors that make contact visitation more manageable there; and there may be legitimate differences of opinion as to what practices are safe within those institutions.

To the extent the denial of contact visitation implicates other constitutional rights, such as the freedom of association, the Sheriff's program of daily non-contact visits, combined with other alternatives for maintaining relationships

through unlimited mail and regular unmonitored telephone calls, is a reasonable, non-content restrictive, time, place and manner regulation justified by compelling security concerns.

3. Cell Searches.

The need for routine cell searches is not in dispute. Rather, the inmates complain that the searches are conducted in a manner which leaves their cells in disarray and results in the improper confiscation of property, facts which the Sheriff denies. Without fully resolving this factual dispute, the District Court determined that it was necessary to permit the inmates to observe the searches as a prophylactic against possible abuse.

The courts below sought to distinguish the holding of this Court in *Wolfish*, reversing a similar order, on the grounds that, unlike the District Court in *Wolfish*, the District Court here gave adequate weight to the administrator's concerns, and based its analysis, not on disapproved Fourth Amendment grounds, but on the due process rights of the inmates. The distinctions are without substance. Both the courts in *Wolfish* and this case considered similar security concerns but simply disagreed on the extent of those concerns and the means needed to meet them. Both courts relied in *haec verba* on the same reasoning. This Court rejected that approach in *Wolfish*, and should do so here. The Sheriff reasonable needs to conduct such searches out of the presence of the inmates to prevent inmates from interfering with the likelihood of locating dangerous contraband, to prevent disruption of the jail operation, and to avoid risk of harm to inmates and staff. Moreover, there is no compelling reason to believe that the inmates' presence will effectively deter abuse.

ARGUMENT.

1. The Courts Below Misapplied the Principles of *Bell v. Wolfish* in Finding That the Challenged Conditions Were Such Exaggerated Responses to Security Concerns That They Would Support an Inference of Punitive Intent.

As the Court of Appeals observed (Mem. Op., PA 19-20), *Bell v. Wolfish*, 441 U.S. 520 (1979), set forth the tests for evaluating constitutional attacks by pretrial detainees on conditions or restrictions during their confinement. "Where a condition implicates the fourteenth amendment's protection against deprivation of liberty without due process, the proper inquiry is whether the condition amounts to punishment. *Id.* at 538. A condition is punitive if there is a showing of express intent to punish. Otherwise, if a particular condition is reasonably related to a legitimate nonpunitive objective, it does not, without more, amount to punishment. *Id.* Legitimate objectives include both insuring the detainee's presence at trial and facilitating the effective management of the facility. *Id.* at 539-40. Where a restriction implicates another constitutional right as well, a court must assess whether the condition or restriction impermissibly infringes that right. In making that assessment, however, the court must recognize that the essential goals of maintaining security and preserving internal order and discipline may require some limitation on the constitutional rights of detainees, *id.* at 546, and must grant wide-ranging deference to prison administrators in the adoption of policies to serve these goals. *Id.* at 547-58" (Mem. Op., PA 19-20).

Although espousing this test, nether the District Court nor the Court of Appeals applied it.

In its initial decision, the District Court, without benefit of this Court's opinion in *Bell v. Wolfish*, formulated its own standard of review, which the Court of Appeals found tracked closely the test promulgated in *Wolfish*. The test applied by the District Court was "whether the challenged conditions or restrictions are *reasonably necessary* to the maintenance of security, order, and safety in the institution or whether they constitute an *exaggerated* response by the custodial officials to these considerations" (Supp. Mem. Dec., PA 30; emphasis added). Further elaborating this test, the Court observed that "if jail security and order can be protected by *less restrictive means*, the conditions and practices *must be deemed unreasonable as an exaggerated response*" (*Id.*, emphasis added). The Court of Appeals, in remanding the matter, correctly observed that this Court had rejected this "less restrictive means" mode of analysis (Mem. Op., PA 4).

The matter was remanded to the District Court for reconsideration, noting that the District Court could apply the *Wolfish* standards without further trial on the merits (Opinion, A 20).

No further evidentiary hearings were held. On remand the District Court acknowledged that *Wolfish* required some differences in analysis, but no difference in result, and reaffirmed its previous orders. The District Court concluded "that, regardless of how it is phrased the test still remains: 'What is reasonable under the circumstances?' " (Mem. Dec. 2, PA 25). The District Court opined that in all of its decisions in this action, the previous as well as the latest, the Court "was trying to find 'the mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application' " (*Id.*). Although reaching the very same result without further evidentiary hearings, the Court, in professed compliance to

the mandate of the Court of Appeals, disclaimed that it was relying upon the rejected doctrine that proof of the availability of less restricted means demonstrated that prison officials had exaggerated their response to security concerns (Mem. Op. Dec. 2, PA 28). Relying upon this Court's quote from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), that absent a showing of expressed intent to punish, the determination of whether a condition is impermissible punishment "generally will turn on 'whether an alternative purpose to which (the restriction) may rationally be connected is assignable for it, and whether it appears excessive in relationship to the alternative purpose assigned (to it.)' " *Wolfish*, *id.* at 539. The District Court concluded that each condition was excessive in relation to the alternative purpose, and therefore inferred an impermissible punitive purpose.

The validity of the District Court's determination devolves to whether its notion of "excessive" is consistent with the principles promulgated by this Court. This Court in *Wolfish*, and in prior decisions, provided considerable insight into those conditions that might support a finding of inferred punitive intent. This Court observed in footnote 20 in *Wolfish* "that in the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, *which may on its face appear to be punishment*, is instead but an incident of a legitimate non-punitive governmental objective. See *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168. [L]oading a detainee with chains and shackles may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation *so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods*, would not support a conclusion that the purpose for which they were imposed was to punish."

Wolfish, n. 20 at 539; emphasis added.

This footnote suggests that absent an express intent to punish, the condition must appear on its face to be punishment; that to find the response to legitimate objectives to be exaggerated, the condition itself must be very harsh, and employed to achieve objectives that could be accomplished by many alternative and less harsh means. In essence, there must be such obvious alternative, less harsh means of acccomplishing the same purposes, that the means chosen are arbitrary and irrational.

The means chosen by the District Court and approved by the Court of Appeals may be reasonable approaches, but they are not the only reasonable means of providing opportunities for an inmate to visit with and maintain contact with family and friends. The means chosen by the Sheriff, which maximize the frequency of opportunity for visitation, coupled with alternative means of maintaining contact with family and friends through mail and regular phone calls, does not appear overly harsh nor necessarily even preferable to less frequent contact type visits as perceived by the Court. "Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional." *Wolfish*, *supra*, n. 25 at 543. Only in the clearest of cases should the inferred punishment prong of the *Wolfish* test result in invalidating a practice or condition that is directly and genuinely related to real, serious, and specific security concerns.

> "[T]he problems that arise in the day-to-day operations of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. [Ci-

tations and footnotes omitted]. Such considerations are peculiarly within the province and professional expertise of corrections officials, and in the absence of *substantial evidence* in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." [Emphasis added]. *Wolfish, supra*, 547-48.

2. The Prohibition of Contact Visits Is Not Founded on an Express Intent to Punish, and Is Directly Related to Genuine, Serious Security Concerns.

It is clear from the record that the Court did not conclude that the Sheriff's prohibition of contact type visitation was founded on an express intent to punish. To the contrary the District Court recognized that "the Sheriff and his staff fully recognize the value of visitation" and commended them for "the attention and effort that they devote to accommodating such a large number of people" (Mem. Dec. 1, PA 50).

Nor can there be any doubt that the prohibition of contact visitation is directly related to real, serious, and legitimate security concerns. The Court recognized that the testimony "demonstrated clearly the great burden that would be imposed upon the jail authorities and the public if . . . contact visits were to be accorded all or most of the five thousand prisoners at the jail. Expensive construction would be required in order to create a new, large and secure visiting area that would be insulated from the jail and from the outside by sally ports. The processing of visitors would have to include careful identification, sometimes including interviews, personal searches and the checking of hand-carried articles. Prisoners necessarily would be strip-searched upon leaving the visiting area. Substantially increased numbers of guards would be required for visual surveillance and supervision. (Para.) This complicated, expensive, and time-

consuming process . . . inevitably would reduce far below the present level of two thousand per day the numbers of visits that could be accommodated" (Supp. Mem. Dec., PA 31).

The District Court further observed "that the establishment of *any* program of contact visits does increase the importation of narcotics into a jail, despite *all* safeguards and precautions" (*id.*, emphasis added), and recognized the Sheriff's concerns "about the increased possibility of the introduction of weapons and of escape attempts with the taking of hostages" (*Id.*).

3. The Record Does Not Support the Court's Conclusion That the Prohibition of Contact Visits at the Jail Was Such an Exaggerated Response to Security Concerns That Punitive Intent May Be Inferred.

Notwithstanding the legitimate custodial interests underlying the Sheriff's determination not to permit contact visitation at Central Jail, the District Court concluded that the Sheriff should be able to adequately determine which inmates were narcotics or escape risks, that "[m]odest alteration within the jail *presumably* could provide appropriate space" [emphasis added], and that by limiting the number of such visits to no more than 1,500 a week, "the scope, burden, and dangers of the program would be substantially reduced" (Supp. Mem. Dec., PA 33).

These conclusions are rather gratuitous in light of the record.

The Sheriff maintained throughout the action that "[t]here are no rooms or facilities within the Central Jail or the new addition thereto that are feasible for conversion to use for contact type visits, even if the security risks were not present" (Lonergan Affidavit, CT 269:1-4 (Dk. 3061); admitted into evidence by stipulation; JA 91). There is little com-

pelling evidence in the record to the contrary.[7]

On the date the Court issued its opinion and judgment reaffirming its orders concerning contact visits after remand, counsel for the Sheriff asked the Court directly what was contemplated by "modest alteration" (RT (5/18/81) 17:6 to 18:7). Counsel requested the Court to clear up this finding (*id.*, RT 18:25 to 19:6). The Court replied: "Mr. Bennett, that was two years ago. I had much better in mind the testimony, my views as to the physical matters. One thing that occurred to me is, if it's necessary it could be done as of that time, which would be, you can cart these people over to Biscailuz Center. Now, don't stick me with that. My only concern is that I believe that if the Sheriff wants to do it, he could find a way of doing it within the facilities he has with or without modest alterations. That's not my department" (*id.*, RT 19:7-16).

Although a facility might be built outside of the Jail, the physical arrangement and flow patterns of the Jail (Lonergan, RT (11/9/78) 4447:7-22; Sumner, RT (11/9/78) 4606:2-4608:13; *cf.*, Gaston, RT (11/8/78) 4316:2-4323:8), and the difficulty of adequately classifying such large groups of inmates make such a plan infeasible.[8]

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[7]Virtually all of the experts, both plaintiffs' and defendants', agreed with the Sheriff that contact visits are not feasible in the existing structure (Lonergan, RT (11/9/78) 4540-4546; Sumner, RT (11/9/78) 4606:4-4608:13; Gaston, RT (11/8/78) 4322:23-4323:8; Nagel, RT (11/10/78) 4186:20-4187:14; Patterson, RT (11/10/78) 4593-4597). Only three suggested that such visits might be possible if a new elaborate satellite facility were constructed near the Jail to accommodate them (Patterson, *id.*; Nagel, *id.*; Gaston, *id.*). One of plaintiffs' experts suggested merely knocking out the glass in some or all of the existing 228 visiting positions (R.T. (11/9/78) 4595, Patterson), an approach which not only would eliminate significant visiting space of the other prisoners, but seems impractical as well (RT (9/23/77) 3746).

[8]Although the warden of San Quentin testified that he felt it was possible to cull out the great majority of risks, that some would always be missed, and would cause a lot of problems (Sumner, RT (11/9/78) 4609:11-4610:12).

The classification system at the Jail, although one of the most sophisticated in the country (Giger, RT (9/22/77) 3198, 3226; Gaston, RT (11/8/78) 4314:13-4315:9), is a housing classification system designed to segregate inmates as to the degree of freedom they can be permitted within a secure facility (Lonergan, RT (11/9/78) 4448:16-23), and is not designed to, and is not adequate to make the more difficult judgments required to safely permit contact visits in such an institution (Lonergan, RT (11/9/78) 4448:23-4449:2; 4450:24).

Even if the classification system worked for this purpose, the physical arrangement of the Jail precludes the necessary separation of inmates to prevent the transfer of contraband from those inmates permitted contact visits to those who are not. Central Jail was designed with a flow pattern where the inmates are allowed considerable freedom of movement, and the officers themselves are, for the most part, separated from the inmates, being locked, in essence, outside of the cell blocks, with the exception of prowl officers (Lonergan, RT (11/9/78) 4447:7-12). Preventing the commingling of various classifications of prisoners is almost impossible. Services such as eating, recreation, visiting, libraries, schools, medical care, and the like, are centralized, and inmates generally go to these activities either unescorted or in large groups supervised by only one or a few officers. Moreover, about one fifth of the pretrial inmates go to one of 26 separate jurisdictional courts each weekday, and are necessarily commingled by court designation for considerable periods of time (JA 73-74, paras. XV. A.1-2).

Even if only lower security inmates are permitted contact visits, within the custodial milieu, pressures are placed upon

such inmates by higher security inmates[9] to accomplish their deeds for them (Sumner, RT (11/9/78) 4610:14-4611:5; *cf.* Gaston, RT (11/8/78) 4290:18-4291:2; 4293:23-4294:8).

Although the District Court suggested an alternative of busing the inmates elsewhere for such visits, it takes little imagination to visualize the impracticality of such an operation. The Court anticipated that the number of inmates might exceed 1,500 a week (Supp. Mem. Dec., PA 33). This logistics problem would be compounded by the fact that the Sheriff already is required to transport one fifth of the pretrial population (700 to 1,000 inmates) a day out of the Jail to 26 separate jurisdictional courts located over the wide expanse of the County and back again at night — a process which is necessarily fraught with considerable security problems,[10] and one which the Court found involved such a strain on the inmates and staff that it alone rose to constitutional proportions (Mem. Dec. 1, PA 55-60).

Although contact visits are apparently feasibly permitted at many prisons,[11] and at some jails, that does not mean they are constitutionally required or feasible at Central Jail or any jail. "Certainly, the due process clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must

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[9]The Jail has an unusually high concentration of violent prison gangs which seek to control narcotics traffic, and command considerable control over their members and others to commit acts of violence to achieve their purposes (Lonergan, RT (9/23/77) 3741-3745; Exhibits ES, ET; *cf.*, Gaston, RT (11/8/78) 4325:15-4328).

[10]*Cf.*, *Guajardo v. Estelle* (S.D. Tex. 1977) 432 F.Supp. 1373, 1380, where the court observed that "the constant flow of inmates in and out of the security perimeters of T.D.C. [a jail facility] does increase the precautions necessary to preserve prison order and security."

[11]*Cf.*, *Wolfish*, *supra*, 1878 at n. 28, where this Court observed that pretrial inmates may "present a greater risk to security and order" than sentenced inmates; *See also*, *McGinnis v. Royster* (1973) 410 U.S. 263, 270, where this Court commented upon the fundamental differences between prisons and jails.

be permitted al all institutions" (*Wolfish, supra,* at 1882). *Cf., Feeley v. Sampson,* 570 F.2d 364 (1st Cir. 1978): "That institution may be constructed so that contact visits are more manageable, or there may be other factors making such visits feasible there. There may even be legitimate differences of opinion among state and local authorities as to what practices are safe within their particular institutions."

4. To the Extent the Denial of Contact Visitation Might Implicate Other Constitutional Rights, Such as the Freedom of Association, the Sheriff's Program of Daily Non-Contact Visits, Combined With Other Alternatives for Maintaining Relationships Through Unlimited Mail and Regular Unmonitored Telephone Calls, Is a Reasonable, Non-Content Restrictive, Time, Place, and Manner Regulation Justified by Compelling Security Concerns.

Neither of the courts below identified any specific constitutional right that was implicated with regard to contact visitation other than the due process violation resulting from the inferred intent to punish. In their brief in the Court of Appeals, however, plaintiffs suggested that the denial of contact visits implicates the constitutional right to freedom of association belonging to prisoners and their visitors, citing *Procunier v. Martinez,* 416 U.S. 396, 408-9 (1974) (Appellee's Brief, Docket No. 81-5461, pp. 33 et seq.).

To the extent that the denial of physical contact during visitation implicates the freedom of association, as plaintiffs suggest, it is a permissible and reasonable, non-content restrictive, time, place, and manner regulation necessary to further significant governmental interests requiring limitation on the constitutional rights of detainees.

The most significant interference with family relationships is the fact of detention itself, to which the conditions

inherent in detention are clearly secondary.

Unlike the censorship of mail practices at issue in *Procunier v. Martinez* (1974) 416 U.S. 396, upon which plaintiffs rely, there is no censorship of the content communicated to persons outside of the facility or with whom the communication may be had. To the contrary, and unlike the practice at many facilities that do permit some form of contact type visiting, the Jail administrators do not place any restrictions on whom the prisoners may visit, do not monitor the visits, and do not impose intrusive security measures that themselves are likely to have an adverse impact on family relationships. Unlike other facilities that significantly limit the frequency of visits, the Jail authorities permit visits on a daily basis for 12 hours a day, permitting an incredible 2,000 visits a day.

In addition to these relatively liberal visiting procedures, the prisoners may maintain their family relationships through the Jail's liberal mail practices, and by virtue of the District Court's order regarding telephones, have the opportunity to make regular unmonitored personal telephone calls.

While no doubt the ability to hug and touch a family member may be an important aspect of a familial relationship, as plaintiffs' experts testified, to focus on this aspect of the relationship alone is to lose sight of the entire picture, and is contrary to the appropriate role of the courts in dealing with detention conditions.

No one could reasonably contest that the frequency of visits with family members is likewise an important consideration in maintaining that relationship. Whether frequency or physical contact is the most important, no doubt could be the subject of some debate.

As the Court observed, the Sheriff recognizes the value of visitation, and the Court commended him for his efforts

in permitting such a large number of visits. Although disagreeing with the Sheriff on the extent of the impact on the frequency of visits caused by permitting some contact visitation, the Court clearly recognized that permitting contact visitation would have an impact upon the frequency of visits generally (Supp. Mem. Dec., PA 31). Although acknowledging the intrusive nature of the security measures that would be required to permit contact visits, the Court apparently concluded that such measures were an appropriate trade-off for the allowance of such visits.

The Court acknowledged the genuineness of the security concerns presented by contact visitation, but disagreed with the Sheriff as to the appropriate means of dealing with them.

In weighing all of these circumstances, the District Court obviously reached a different conclusion than did the Jail administrators. In such circumstances, "(p)roper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution" and the needs of the inmates. *Wolfish, supra*, n. 38.

5. The Weight of Existing Authority and Strong Policy Considerations Favor Deferring to Jail Administrators the Sensitive Decision Whether to Permit Contact Visitation.

Prior to and subsequent to this Court's opinion in *Wolfish*, courts at all levels remain in apparent conflict, at least in terms of results reached, as to whether contact visits are constitutionally mandated generally or at particular institutions, the weight of authority not requiring contact visitation. *See, e.g., Feeley v. Sampson*, 570 F.2d 364, 373 (1st Cir. 1978); *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 757-761 (3d Cir. 1979); *Oxendine v. Wil-*

liams, 509 F.2d 1405, 1407 (4th Cir. 1975); *Jordan v. Wolke*, 615 F.2d 749, 751 (7th Cir. 1980); *Ahrens v. Thomas*, 570 F.2d 286, 290 (8th Cir. 1978); *Ramos v. Lamm*, 639 F.2d 559, 580 (10th Cir. 1980). *Cf., Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978); *West v. Infante*, 707 F.2d 58 (2d Cir. 1983); *Jones v. Diamond*, 636 F.2d 1363, 1377 (5th Cir. 1981); *Hutchings v. Corum*, 501 F.Supp. 1276, 1296 (W.D. Wyo. 1980); *Lock v. Jenkins*, 464 F.Supp. 541, 550 (N.D. Ind. 1978), rev'd in part, 641 F.2d 488, 498; *Cooper v. Morin*, 49 N.Y.2d 69, 399 N.E.2d 1188, 1192 (1979) (not required on federal grounds, but required on independent state grounds); *Inmates of Sybil Brand Inst. for Women v. County of Los Angeles*, 130 Cal.App. 3d 89, 110 (1982);[12] *In re Gallego*, 133 Cal.App. 3d 75. *Contra, Rhem v. Malcolm*, 396 F.Supp. 1195, 1199-1200 (S.D.N.Y.), aff'd, 527 F.2d 1041, 1043 (2d Cir. 1975); *Forts v. Malcolm*, 426 F.Supp. 464, 468 (S.D.N.Y. 1977); *Detainees of Brooklyn House of Detention v. Malcolm*, 421 F.Supp. 832 (E.D.N.Y. 1976); *Campbell v. McGruder*, 416 F.Supp. 100, 105 (D.D.C. 1975), aff'd in part, 580 F.2d 521, 547-48 (D.C. Cir. 1978); *Miller v. Carlson*, 401 F.Supp. 835, 893-95 (M.D. Fla. 1975), aff'd, 563 F.2d 741; *Mitchell v. Untreiner*, 421 F.Supp. 886, 906 (N.D. Fla. 1976); *O'Bryan v. County of Saginaw*, 437 F.Supp. 582 (E.D. Mich. 1977); *Jones v. Wittenberg*, 440 F.Supp. 60, 158-59 (N.D. Ohio 1977).

In *Pell v. Procunier*, 417 U.S. 817 (1974) this Court upheld a prison regulation prohibiting face-to-face inter-

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[12]If the order requiring contact visitation at Central Jail is permitted to stand, male inmates of the County jail system will have an opportunity for such visits, but women inmates of the same jail system will not. *Cf., Inmates of Sybil Brand Inst. for Women v. County of Los Angeles*, 130 Cal.App. 3d 89, 110, upholding the Sheriff's denial of contact visitation at his women's facility.

views between inmates and the press.

This Court touched upon, but declined to decide the question of contact visits in *Bell v. Wolfish*, *supra*, 411 U.S. at 520, as the issue was not challenged in that appeal. However, this Court observed with regard to another issue, the validity of strip searches conducted to discourage smuggling of contraband during such visits, that the need for such searches could be obviated by abolishing contact visitation altogether. Thereafter, in another case, this Court reversed and remanded the issue of contact visitation for reconsideration by the Second Circuit in light of *Bell v. Wolfish, supra; Marcera v. Chindlund*, 595 F.2d 1231 (2d Cir. 1979), vacated, *Lombard v. Marcera*, 442 U.S. 915 (1979).

The question of contact visitation appeared to be presented for resolution with the granting of *certiorari* on that issue in *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981), *cert.* granted *sub nom., Ledbetter v. Jones*, 452 U.S. 954 (1981); however, the matter was dismissed pursuant to Rule 53. *Ledbetter v. Jones*, 453 U.S. 950 (1981).

Not only does the weight of existing authority suggest that contact visitation is not required for jail inmates, but there are sound policy reasons for leaving the determination as to whether to permit contact visitation at a particular institution to that institution's administrators, and the laws and policies of the local governments where they are located.

Contact visitation presents a unique opportunity for the introduction of drugs, weapons, and contraband into a facility, as well as opportunities for escape, the taking of hostages, and injury to visitors, inmates, and staff. As the District Court observed "the establishment of *any* program of contact visits does increase the importation of narcotics into a jail, despite *all* safeguards and precautions". (Supp. Mem. Dec., PA 31; emphasis added). A similar conclusion

with regard to the other risks is supported by the record as well. On the other hand, the opportunity to embrace one's wife, hug one's children, or to have physical contact with persons that are emotionally close is likewise important, and may have tangential benefits within the facility in terms of reducing inmate tensions, easing the transition back to freedom, or facilitating ultimate rehabilitative efforts.[13]

Given the real and serious risks inherent in any program of contact visitation, the sensitive decisions weighing the risks and benefits, determining how much risk to assume and at what cost are the very type of decisions that are most appropriately left with those persons charged with and trained in the operation of the institution.

Certainly, courts should take action to ensure that constitutional rights are observed. But when the practice in question, such as here, is related so directly and inherently to genuine and serious security concerns, the court should be most reluctant to interfere with the jailor's assessment.

This analysis does not mean, as the Court of Appeal apparently feared, that an institution's security interests always predominate (Op., PA 8), nor does it ignore the importance of visitation to inmates, or the adverse psychological effects that might be caused by the lack of physical contact with family members, as testified to by plaintiff's experts.

It reflects, rather, a healthy sense of realism that the management and operation of a jail is difficult and intractable, involving sensitive judgments concerning the secure housing of persons confined against their will, to many of whom violence is no stranger, where the compulsion to

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[13]It is not clearly unreasonable to believe that for many or even most inmates, such contact may enhance tension or add to the difficulty of coping with the enforced separation from their families.

obtain drugs and other contraband may override rationality, and where the cost of miscalculation may be human life, and its forfeit instant.

6. The Decision Below Concerning Cell Searches Is Indistinguishable in Terms of Reasoning and Relief Ordered From That Rejected in *Wolfish*.

Jail authorities conduct thorough searches of inmate cells and housing areas to locate contraband or other items not allowed in the cells (Mem. Dec. 1, PA 60-61) sometimes in the absence of prisoner occupants[14] (JA 72, para. XII. A.1). The plaintiffs admit that such searches "are necessary to maintain the security of the facility, prevent escapes, maintain order, and minimize the potential for injury to inmates and staff" (JA 72, para. XII. A.2).

Under the former practice a team of officers would enter and search an entire housing area after the inmates were removed or were outside of their housing areas for other activities such as meals, recreation periods, or the like. In such fashion the searches could be conducted reasonably quickly with some frequency, with little disruption to the search, and without preventing the inmates from engaging in other activities occurring elsewhere in the jail.

Although admitting the necessity for such searches, the prisoners contend, as did the prisoners in *Wolfish* (*United States ex rel. Wolfish, supra*, 439 F.Supp. at 148-49) that their property was left in disarray, that items were unnecessarily removed and destroyed, and that valuable property

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[14]As was the case in *Wolfish*, cell searches were of two types: general "shakedown" searches of entire housing areas, and searches of specific cells, usually based upon specific information or cause. Searches of individual cells may be in the presence of some inmates. *Cf., United States ex rel. Wolfish v. Levi*, 439 F.Supp. 114, 148 (S.D.N.Y. 1977). The Sheriff's written procedures are set forth in Exhibits BR, BO, A (pp. 18, 31-32), CC and DD (PCO, admitted facts, CTI 423:10-13).

was taken without a receipt being given (Mem. Dec. 1, PA 61). The Sheriff insisted that the searches were accomplished with minimum disruption to the inmates' possessions (*id.*).

In its initial decision, as with the lower court in *Wolfish*, without making specific findings resolving the conflicting testimony as to the manner in which the searches were conducted, the Court ordered that "[f]uture shakedowns should be made while the respective inmates remain outside their cells but near enough to observe the process and raise or answer any relevant inquiry" (Mem. Dec. 1, PA 61). In doing so the District Court relied, in *haec verba*, on the very reasoning of Judge Frankel, disapproved in *Wolfish*:

> " 'Allowing inmates to observe from a reasonable distance the searching of their rooms would go far to eliminate these grounds of complaint. An officer viewed by the owner is more likely to fulfill the stated duty to put things back as they were. The claim of stolen property is far less likely to be made, the grounds for suspicion, or ostensible suspicion, being largely obviated. Having one's things searched is no pleasure in the best of circumstances. Being denied the right even to watch the invasion is a blunt oppression.' " (Mem. Dec. 1, PA 61).

In response to the Court's decision, the Sheriff developed four alternative procedures to comply with Court's order, and invited the Court to observe them in operation and to select the final procedure[15] (Supp. Mem. Dec., PA 35). The

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[15]This does not mean, as plaintiffs contended below, that the Sheriff endorsed any of the alternative plans in comparison to his invalidated procedures. The fact that the Sheriff attempted to develop and demonstrate a number of alternatives to the Court's order merely reflects his good faith effort to deal with the problems envisioned by the Court and is not an endorsement or acknowledgment of the acceptability of such alternative plans. *Cf.*, Supp. Mem. Dec., PA 39.

first demonstrated method, method A, involved searching all of the cells in a row while the inmates remained in the dayroom, a method similar to the Sheriff's invalidated procedure. In method C, the method ultimately endorsed by the Court, after all inmates were removed to a dayroom, the men occupying a particular cell were brought back from the dayroom and positioned under guard outside of their cell while it was being searched. When the search of that cell was completed, the men were locked in their cell and the remaining cells were searched successively in the same manner (*id.*). All agreed that the other two methods, methods B and A, were so unsatisfactory and expensive that they were rejected outright (*id.*).

Although the District Court found little difference between methods A and C in terms of time and expense (*id.*, PA 35-36), it is obvious that both methods A and C are far more complex, time consuming, and disruptive than the former procedures which permitted a team to search all or many of the cells at the same time, rather than one by one, without need to identify, escort, and guard the occupants of a cell as the search was conducted because all or most of the inmates were away from the housing area for meals or other activities.

The District Court and the Court of Appeals, with one dissent, sought to distinguish the intervening opinion of this Court in *Wolfish* holding that a similar order was not constitutionally required.

As ably pointed out in the dissent in the Court of Appeals (Op., PA 15-17), the distinctions are without substance.

First, the District Court and the Court of Appeals distinguished *Wolfish* on the grounds that the District Court in *Wolfish* didn't give adequate weight to the official's security concerns, including specifically the concern that inmates

would frustrate the search by distracting personnel and moving contraband ahead of the search team (Op., PA 10; Mem. Dec. 2, PA 27).

As pointed out by the dissent, however, "it is factually inaccurate to state that the District Court in *Wolfish* did not also weigh those concerns. See *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 148-49 (S.D. N.Y. 1977)" (Op., dissent, PA 16). The problem with the district courts' analysis, both in *Wolfish* and here, is that not sufficient weight was given to those concerns which were dismissed as speculative, not being supported by strong empirical examples (*Wolfish v. Levi, supra* at 149). The District Court's dismissal of the Sheriff's concerns in this case is little different.

The District Court did not deal at all with most of the security concerns of the Sheriff. The Sheriff offered testimony that permitting inmates to observe cell searches, even under the ordered procedure, would interfere with the likelihood of locating contraband,[16] disrupt the jail operation,[17] lead to friction between inmates and guards,[18] create risk of harm to inmates and staff,[19] and would be less efficient and more costly (Lombardi, RT 4120:20-23).

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[16]If the inmates observe where and how searches are conducted, they learn how better to hide contraband (Lombardi RT 1 4116:17-19); and the concomitant notice of the search gives inmates an opportunity to dispose of or move the contraband (Lombardi, RT 4117:9-12; 4117:20-4118:10).

[17]By requiring more deputies who must leave other tasks elsewhere in the jail, and keeping inmates at one location, away from other activities, for long periods of time (Lombardi, RT 1 4118:17-4120:17).

[18]Inmates become upset and more likely to get into altercations with guards (Lombardi, RT 4116:21-24); and some inmates felt it was humiliating to have to watch their property being searched (Lombardi, RT 4133:3-9; 4133:19-21).

[19]Not only because of the altercations and friction, but because of the construction of the jail where the drop from the upper cell tiers to the cellrows below is guarded only by a low railing (Lombardi, RT 4134:20-24; *cf.*, 4141:10-21; 4120:23-4121:11).

Second, the lower courts in this case sought to distinguish *Wolfish* on the grounds that the Court of Appeals in *Wolfish* did not identify the constitutional provision on which it relied, and the District Court in *Wolfish* found a fourth amendment violation which the Supreme Court ruled to have been in error. Here, it is contended that the District Court founded its decision on the due process clause, to discourage the improper handling and confiscation of inmate property. The distinction is inaccurate and erroneous. The Second Circuit in *Wolfish* explicitly noted that cell searches could give rise to a due process claim in certain circumstances. See 373 F.2d at 131, n. 29. More fundamentally, the District Court here relied in *haec verba* upon the very reasoning of the District Court in *Wolfish*, that permitting inmates to observe the searches would deter or eliminate the grounds for the inmates' concerns about mishandling and confiscation of their property. (*Cf., United States ex rel. Wolfish v. Levi*, 439 F.2d at 149; Mem. Dec. 1, PA 61).

Moreover, this Court specifically rejected the deterrent effect as a basis for requiring the inmates' presence during searches, noting that even if there were abuses by guards in handling the prisoners' property, that the litigation was not an action for damages, but an action to enjoin the search rule in its entirety. "When analyzed in this context, proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of detainees." *Wolfish, supra*, n. 38 at 441 U.S. 557.

Moreover, there is little reason to believe that permitting the occupants of a particular cell to observe the search of their cell would be as effective in deterring abuse as the District Court contemplated based upon its brief one-time

observation of the procedures and its brief inquiry of two inmates. Assuming that the deputies were motivated to regularly abuse the search procedures, one would certainly expect the presence, in the midst of litigation, of a federal judge, counsel, and supervisory staff to motivate the deputies to act with the utmost respect and discretion. Whether the presence of the few inmate occupants of a particular cell in less official circumstances would have similar deterrent effect is less certain. The effective deterrent to such inexcusable abuse of authority must be found elsewhere, through training, supervision or damage actions.

The lower courts in *Wolfish*, and the lower courts here considered the same concerns of both inmates and jail staff, and ordered the same relief. This Court rejected that approach in *Wolfish*, and it should reject it here, as well.

CONCLUSION.

For these reasons the Court should reverse the opinion of the Court of Appeals for the Ninth Circuit of July 14, 1983, affirming the Judgment of the District Court of the Central District of California of August 8, 1980, requiring the Sheriff of Los Angeles County to permit contact visitation, and to conduct routine cell searches in the presence of available inmates at the Los Angeles County Central Jail.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Provisions.

United States Constitution, Amendment 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28.

§1343. Civil rights and elective franchise.

The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

§2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202. Creation of remedy.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

United States Code, Title 42.

§1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.